

1 Case No.: 23-cv-03205-VC

2 UNITED STATES DISTRICT COURT FOR THE  
3 NORTHERN DISTRICT OF CALIFORNIA

4 In re: THAI MING CHIU,	}	5 Debtor.	}	6 <b>APPELLANT'S RESPONSE TO</b> <b>APPELLEE'S MOTION TO</b> <b>DISMISS</b>
7		7 SIMON THAI MING CHIU,		
		8 Plaintiff and Appellant,		
		9 v.		
10		10 CHARLES LI,		
		11 Defendant and Respondent.		
12		12 }		

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14 Appellee's motion to dismiss incorrectly argues that, after the due date passed  
 15 for his opening brief to be filed, it was incumbent upon him to seek relief based upon  
 16 excusable neglect under Federal Rule of Bankruptcy Procedure 9006(b)(1). (Mot.  
 17 At 6-7.) Federal Rule of Bankruptcy Procedure 8018(a)(4) permits a party or the  
 18 Court to move to dismiss the appeal after the due date has passed. However, if no  
 19 motion to dismiss is pending, or no dismissal has been entered, there is no  
 20 requirement that appellant seek relief under Rule 9005(b)(1) before filing the  
 21 opening brief.

22 Thus, appellant did not have to move for relief from a default or request leave  
 23 to file a late brief, based upon excusable neglect under Rule 9006(b)(1) because,  
 24 before appellant filed the opening brief, neither appellee nor the Court sua sponte  
 25 moved to dismiss the appeal under the Federal Rules of Bankruptcy Procedure  
 26 8018(a)(4). Appellant's Brief was accepted for filing without appellant having to  
 27 make a motion under Rule 9006(b)(1).

28 After appellant's brief was filed, appellee's counsel requested that appellant's

1 counsel grant an additional 30 days to file appellee's brief, to which appellant's  
2 counsel agreed. Appellee never mentioned that he was contemplating a motion to  
3 dismiss before negotiated additional time to file his brief. The Court accepted the  
4 parties' stipulation and ordered a modified briefing schedule.

5 After an opening brief has been filed, “[t]he district court may excuse  
6 non-compliance or grant specific other limits.” *In re Drexel Burnham Lambert*  
7 *Group, Inc.*, 142 B.R. 633, 636 (S.D.N.Y. 1992). Here, the Court granted specific  
8 other time limits by modifying the briefing schedule. Once the Court modified the  
9 briefing schedule, appellant’s noncompliance with Rule 8018(a)(1) was excused, and  
10 the issue of appellant’s opening brief being timely filed was moot.

In *In re Drexel Burnham Lambert Group, Inc.*, *supra*, the court held that appellant's failure to file a brief for over a month after it was due was "alone . . . not sufficient to warrant dismissal." 142 B.R. at 636. The court there found that appellant had an excuse for its tardiness "albeit weak and rather late itself." *Id.*<sup>1</sup>

15        Here, the undersigned was not attorney of record at the time that the brief was  
16 due. Indeed, the undersigned certifies that he had no knowledge this case even  
17 existed until December of last year. The undersigned has been informed that there  
18 was some confusion as to whether the case was going to proceed in the Bankruptcy  
19 Appellate Panel, and that former counsel was waiting for a briefing schedule. In any  
20 event, appellee does not argue that he is suffering prejudice from the delay, which he  
21 has further extended by his being granted additional time to file his appellee's brief.

22 Appellee argues that appellant's late filings in a prior bankruptcy case and  
23 unauthorized filings through his former attorney in the underlying bankruptcy case  
24 should be held against him when it comes to the late filing of his opening brief.

26       <sup>1</sup> The undersigned realizes his response to appellee's motion is late by a few  
27 days. He did not see the email alerting him to the docketing of appellee's motion  
28 until yesterday afternoon. He was preparing for a jury trial all week in Riverside  
County Superior Court and was distracted by an email coming in from the State  
Court of Appeal the same time as the one from the District Court.

1 (Mot. At 4.) This Court should reject this line of argument. These prior acts are  
2 more prejudicial than probative because they involved other issues than mere  
3 tardiness. Here in contrast, there is essentially mere tardiness, without any other  
4 substantive irregularity or prejudice to the opposite side.

5 There is a strong public policy behind the Federal Rules of deciding cases on  
6 their merits. *Jones v. Las Vegas Metro. Police Dep't.*, 873 F.3d 1123, 1128 (9th Cir.  
7 2017). Appellee is trying to avoid dealing with the merits of appellant's appeal by  
8 distracting the Court with these prior events.

9 For the foregoing reasons, the Court should deny the motion to dismiss.

10 DATED: February 16, 2024

Respectfully Submitted,

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13 Jeffrey A. Needelman  
14 Attorney for Plaintiff and Appellant  
15 Simon Thai Ming Chiu  
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